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No. 91-1618

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

GEORGE V. VOINOVICH, Governor of the State of Ohio, *et al.*,

Appellants,

v.

BARNEY QUILTER, Speaker Pro Tempore of the Ohio House of Representatives, *et al.*,

Appellees.

Appeal from the United States District Court for the Northern District of Ohio

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APPELLANTS' REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	2
I. THE DISTRICT COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS	2
II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT	14
III. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF THE FOURTEENTH AMENDMENT	15
CONCLUSION	19

TABLE OF AUTHORITIES

Cases	Page
Abate v. Mundt, 403 U.S. 182 (1971)	15
Baird v. Consolidated City of Indianapolis, —— F.2d ——, 1992 WL 240973 (7th Cir. September 30, 1992)	7
Brown v. Thomson, 462 U.S. 835 (1983)	15, 16
Chisom v. Roemer, 111 S.Ct. 2354 (1991)	13
City of Mobile v. Bolden, 446 U.S. 55 (1980)	15
Davis v. Bandemer, 478 U.S. 109 (1986)	7
Fund for Accurate and Informed Representation, Inc. v. Weprin, —— F. Supp. ——, 1992 WL 204274 (N.D.N.Y. Aug. 19, 1992)	15
Mahan v. Howell, 410 U.S. 315 (1973)	16
Reynolds v. Sims, 377 U.S. 533 (1964)	15
Thornburg v. Gingles, 478 U.S. 30 (1986)	8, 10, 13
Voinovich v. Ferguson, 63 Ohio St. 3d 198 (1992)	5, 16, 17
United States Constitution	
Fourteenth Amendment	2, 4, 15
Fifteenth Amendment	1, 4, 15
Miscellaneous	
42 U.S.C. § 1973	*passim*
Ohio Const., Art. XI, § 3	18
Ohio Const., Art. XI, § 4	18
Ohio Const., Art. XI, § 9	16, 17
Ohio Const., Art. XI, § 10(B)	16, 17

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INTRODUCTION

Despite Appellees' many diversions and obfuscations, they, as well as Amici Curiae Congressman Louis Stokes, *et al.*, have failed to defend or explain the basic flaw in the district court's decision: the finding of a § 2 violation because *Appellants* failed to satisfy *their* burden of proof. Imposing such a burden upon apportioning officials, rather than plaintiffs, is completely at odds with the language and purpose of the Voting Rights Act and constitutes a serious interference with state authority.

Furthermore, Appellees have failed to direct this Court's attention to any evidence supporting the district court's belated finding of intentional discrimination in violation of the Fifteenth Amendment. Nor have Ap-

pellees, or Amici Curiae NAACP Legal Defense and Educational Fund, *et al.*, justified the district court's even more belated finding that the 1991 plan of apportionment, as amended, violates the one person-one vote requirement of the Fourteenth Amendment. Consequently, the decisions of the district court must be reversed and this case remanded with instructions to enter judgment in favor of Appellants.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY SHIFTED THE BURDEN OF PROOF FROM THE PLAINTIFFS TO THE APPORTIONING OFFICIALS.

A. As with their *Motion to Dismiss or Affirm*, Appellees attempt to minimize the importance of the district court's shifting of the burden of proof to Appellants. The district court's January 31, 1992 Order, which is amplified and restated in its Orders of March 10 and 19, 1992, however, indisputably requires state redistricting officials to "justify" their construction of minority controlled state legislative districts. In so doing, the district court impermissibly relieved the plaintiffs of the burden of showing minority vote dilution and shifted the burden to defendants by requiring them to show a past violation of § 2 of the Voting Rights Act and/or that their redistricting plan does not presently violate § 2. Although *Appellees' Brief* attempts to trivialize this issue, it is the primary flaw of the district court's decision in this case. Appellees were unable to satisfy their burden of proving their § 2 claim, but nevertheless prevailed before the district court *because* the burden of proof was impermissibly shifted to Appellants.

By shifting the burden of proof to state redistricting officials, the district court in effect stripped those officials of their legitimate discretion to take action consistent with § 2 of the Voting Rights Act. In drafting the plan, Appellants never intended to prove, nor did they have the

legal obligation to prove, that the 1981 apportionment was in violation of the Voting Rights Act. The evidence considered by the Apportionment Board and submitted to the district court by Appellants was never meant to establish such a violation. That evidence was, however, sufficient to induce Appellants to consult extensively with minority groups [1] in an effort to discourage potential plaintiffs from filing a § 2 challenge or, if such challenge was filed, to prevent it from being successful.[2]

Appellees evidently concede Appellants' principal contention—that the district court wrongfully shifted the burden of proof—by their failure to challenge that con-

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[1] Appellees deceptively suggest that this Court should discount Appellants' extensive cooperation with the Ohio NAACP and particularly with its reapportionment project coordinator Floyd Johnson ("Johnson")—as well as its support for Appellants' plan of apportionment—because Johnson was paid to act as a "consultant" for the Ohio Senate. See *Appellees' Brief* at 7-8. In reality, however, Johnson's "consulting contract" with the Ohio Senate was nothing more than an effort to provide funding for Johnson's redistricting activities, which had not been adequately funded by the Ohio NAACP. D. 125 at 57. Moreover, Appellees fail to advise the Court that Johnson was also paid to act as a "consultant" to those responsible for drafting the proposed plan on behalf of Appellees Ferguson and Quilter. D. 73 at 48; D. 125 at 56.

Johnson, *on behalf of the Ohio NAACP*, has unequivocally voiced his support for districts in all of Ohio's counties containing substantial minority population. D. 125 at 58; D. 154, Ex. 16 at 21-24. The National NAACP, as well as several other national minority groups, also apparently support Appellants' construction of these districts. See *Brief of Amici Curiae NAACP Legal Defense and Educational Fund, et al.*, at 12-22.

[2] Appellees evidently contend that Article XI of the Ohio Constitution prohibits the Apportionment Board from pursuing such a policy because "[t]he entirety of Ohio's 'policy' regarding apportionment is set forth in Article XI of the Ohio Constitution . . . ." *Appellees' Brief* at 28. No such question of state law is before this Court, see *infra* at 5-6, and in any event, it is ludicrous to suggest that state officials may not maintain a policy of consulting with affected groups in their efforts to comply with federal law.

tention on its merits. Appellees' sole response on this issue is to mischaracterize Appellants' argument, claiming that we "seek the unreviewable discretion to apply Voting Rights Act provisions . . . ." *Appellees' Brief* at 22. On the contrary, Appellants have never sought power to "apply" the Voting Rights Act at all; we seek to comply with it, exercising redistricting authority in the first instance, subject to subsequent Voting Rights Act challenge.

B. In an effort to obfuscate the basic flaw in the district court's decision, Appellees baselessly suggest that Appellants violated § 2 of the Voting Rights Act, the Fourteenth and Fifteenth Amendments to the United States Constitution, and Article XI of the Ohio Constitution in drafting Ohio's 1991 plan of apportionment. Appellees' arguments simply are not supported either in law or fact, and thus serve only to mislead this Court.

1. For example, Appellees attack the 1991 plan of apportionment, *i.e.*, "Amendment C," as though the final amendments to that plan, *i.e.*, "Amendment D" adopted in February, 1992, did not exist.[3] They repeatedly refer to the relative minority populations of the house districts under "Amendment C," without reference to such population figures under "Amendment D." See *Appellees' Brief* at 9-13.[4]

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[3] As noted in *Appellants' Brief*, the Apportionment Board adopted a redistricting plan on October 1, 1991. D. 154, Ex. 16 at 31-32. Minor technical amendments to that plan were adopted on October 3, 1991, and this version of the plan was labeled as "Amendment C." D. 154, Ex. 17 at 9-14. The plan was technically amended on February 18, 1992, pursuant to the instructions of the Ohio Supreme Court and the amended version was labeled as "Amendment D." D. 147, Ex. C at 59. Appellees and the district court refer to "Amendment C" as "the 1991 plan," and "Amendment D" as "the 1992 plan." The 1991 plan of apportionment, as amended on February 18, 1992, will be referred to herein as either "the 1991 plan of apportionment, as amended," or "Amendment D."

[4] See also *Appellees' Brief* at 34 where Appellees refer to their "Charts A & B" in an attempt to show that Appellants' plan of

Similarly, Appellees refer to numerous alleged Ohio Constitutional violations under "Amendment C" while refusing to acknowledge that the Apportionment Board adopted "Amendment D," pursuant to the express instructions of the Ohio Supreme Court, *in order to make technical corrections to the plan.* See *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992). Indeed, the district court in this case observed that "*[t]hese [Ohio Constitutional] deficiencies were corrected in the 1992 Plan.*" *Quilter v. Voinovich*, J.A. at 337 (N.D. Ohio May 5, 1992). Appellees simply refuse to acknowledge this fact.

"Amendment D" is the plan now in effect, and the plan under which the June 2, 1992, primary election was conducted. See *Quilter v. Voinovich*, J.A. 333 (N.D. Ohio May 5, 1992). Appellees' efforts to obscure the factual and legal issues in this case by continuing to attack alleged deficiencies in "Amendment C" must, therefore, fail.

2. Furthermore, although Appellees go to great lengths attempting to convince this Court that Appellants completely disregarded Article XI of the Ohio Constitution in drafting the 1991 plan of apportionment, as amended, it must once again be emphasized that these state law issues are not before this Court. The district court abstained on all state law issues, as those issues were before the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St.3d 198 (1992). *Quilter v. Voinovich*, App. at 15a (N.D.Ohio Jan. 31, 1992). The Ohio Supreme Court issued an order declaring "the plan to be constitutional." *Voinovich*, 63 Ohio St. 3d at 200.[5] Appellees did not seek

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apportionment unlawfully disperses minority voters into districts with less than 10% African American population. Appellees' fail to advise the Court, however, that "Charts A & B" are based on exhibits of Appellees' expert witnesses, which exhibits relate solely to "Amendment C."

[5] Appellees attempt to minimize the effect of the Ohio Supreme Court's opinion by noting that the issues before that Court were

this Court's review of the Ohio Supreme Court's decision. Consequently, no court has found that the 1991 plan of apportionment, as amended, violates Article XI of the Ohio Constitutionn, and thus, these state law issues are not before this Court.

3. In a further and even more distressing effort to detract from the primary issue in this case—the district court's improper shifting of the burden of proof to state redistricting officials—Appellees now endeavor to recast what is truly a political gerrymandering claim as a claim of racial discrimination under § 2 of the Voting Rights Act. Remarkably, Appellees argue that Appellants violated the Voting Rights Act because they failed to create enough districts wherein African Americans constituted at least 13% of the voting age population. Appellees assert that such districts have historically elected a Democrat, and, they seem to suggest, the only white representatives responsive to the needs of the African American community are Democrats. See Appellees' Brief at 3.[6] Appellees simply cannot make out a claim of a § 2 violation on the basis of an allegation that the 1991 plan of apportionment, as amended, will reduce the number of

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limited. The district court in this case, however, abstained on all state law issues *two weeks prior* to the Ohio Supreme Court's decision. Appellees, who had earlier filed but then withdrew their Ohio Constitutional counterclaim in the Ohio Supreme Court action, briefed, but failed to refile their claims as a counterclaim in the Ohio Supreme Court following the district court's decision to abstain. The district court, which issued ten orders following the Ohio Supreme Court's allegedly "narrow" decision, see D. 156, 159, 163 [App. 118a], 169, 173 [App. 127a], 176 [App. 324a], 187, 189, 191, & 194 [J.A. 333], has never departed from its decision to abstain. Appellees' belated effort to revive the very state law claims that have either been resolved or abandoned must, therefore, be rejected.

[6] As noted in *Appellants' Brief*, Floyd Johnson of the Ohio NAACP decried Appellees' efforts to "use" black voters to bolster the incumbencies of white Democrats as "plantation politics" which could no longer be tolerated. D. 147, Ex. B at 62.

white Democrats elected from districts with 13% black voting age population. See *Baird v. Consolidated City of Indianapolis*, —— F.2d ——, 1992 WL 240973, slip op. at *4 (7th Cir. Sept. 30, 1992) ("Section 2 of the Voting Rights Act forbids the 'denial or abridgment of the right . . . to vote on account of race or color.' It is a balm for racial minorities, not political ones—even though the two often coincide. * * * The Voting Rights Act does not guarantee that nominees of the Democratic Party will be elected, even if black voters are likely to favor that party's candidates.").

Appellees' advancement of this argument merely supports Appellants' contention throughout this litigation that this case was commenced primarily to preserve the lopsided Democratic majority in the Ohio House of Representatives. In essence, Appellees undertake to convince this Court that, despite the evidence that the plan of apportionment is politically fair,[7] Appellants impermissibly politically gerrymandered Ohio's legislative districts. Appellees were unable to prove their claim of political gerrymandering in the court below, and now seek to recast that unsuccessful claim as a claim under § 2 of the Voting Rights Act.

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[7] Dr. Gary King, Professor of Government at Harvard University and Director of the Harvard Data Center, testified that the plan of apportionment, both as adopted on October 3, 1991, and as amended on February 18, 1992, had a partisan bias of zero, *i.e.*, was biased in favor of neither political party. J.A. 217-18, 240-44, 260-61. Even Appellees' evidence based upon a "political index" (which, incidentally again ignores "Amendment D") indicated that Democrats would likely win 41 of 99 Ohio House seats under "Amendment C," while only winning 45 under the plan submitted by Appellees Ferguson and Quilter. Given this evidence, it is not surprising that the district court ignored, and therefore presumably rejected, Appellees' political gerrymandering claim. See *Davis v. Bandemer*, 478 U.S. 109 (1986) (Fourteenth Amendment political gerrymandering claim can only be established if redistricting plan "consistently degrades" a group of voters' opportunity to influence the electoral process as a whole).

4. Furthermore, Appellees once again mischaracterize Appellants' actions as having ignored the commands of the Ohio Constitution in order to create minority controlled districts "wherever possible." This argument is without factual or legal support.

Appellees accomplish this mischaracterization by referring to isolated quotes, taken out of context, wherein Appellant Tilling, Secretary to the Apportioning Persons, explained the process of drawing legislative districts to members of the public. *Appellees' Brief* at 4-5.[8] When asked about these statements in his deposition, Tilling carefully explained that he was merely attempting to introduce this complex subject to members of the public, and that minority controlled districts should be drawn where warranted under the analysis of *Thornburg v. Gingles*, 478 U.S. 30 (1986). D. 102 at 24-27, 29.

Consistent with Tilling's explanation, Appellants have maintained throughout the process of drafting the plan and throughout the course of this litigation that § 2 of the Voting Rights Act simply requires state redistricting officials to avoid the dilution of minority voting strength. *Findings and Conclusions*, App. at 270a (Ohio Apportionment Board Feb. 18, 1992). *It neither requires the creation of minority controlled districts nor prohibits their creation.*[9]

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[8] As properly noted by Amici Curiae NAACP Legal Defense and Education Fund, *et al.*, Tilling's opinion about the requirements of the Voting Rights Act is irrelevant. See *Brief of Amici Curiae NAACP Legal Defense and Education Fund, et al.*, at 14. Rather, the relevant inquiries are whether the Voting Rights Act prohibited the Apportionment Board from drawing minority controlled districts to avoid a successful § 2 challenge, and whether Appellees proved that the 1991 plan of apportionment, as amended, diluted minority voting strength. Appellees themselves apparently concede this point. *Appellees' Brief* at 29 ("The 1982 amendments [to the Voting Rights Act] made clear the Congressional determination that violations were to be judged by their *effect* regardless of the underlying *intent* of the state actors.") (emphasis in original).

[9] Appellees resort to isolated quotes from legal memoranda filed in the district court to suggest in their *Brief* that Appellants have

Indeed, as conveniently ignored by Appellees, the 1991 plan of apportionment, as amended, *i.e.*, "Amendment D," contains only five house districts in which African-Americans constitute a majority of the voting age population. The 1981 plan of apportionment contained four such districts, and the plan proposed by Appellees Ferguson and Quilter contained six.[10] The suggestion, therefore, that Appellants operated under a *per se* rule of creating minority controlled districts is simply not supported by the facts of this case.

C. Appellees have once again asserted that Appellants have waived their argument that the district court impermissibly shifted the burden of proof on Appellees' § 2 claim. In addition to their contention that Appellants waived this argument by not appealing from the district

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only recently adopted this position. See *Appellees' Brief* at 17-18. A thorough review of the briefs filed by Appellants in the district court, however, clearly indicates that we have consistently maintained the position advocated before this Court: Appellees could not prevail on their Voting Rights Act claim unless *they proved* that the districts as drawn diluted minority voting strength. The quotations from Appellants' lower court briefs, which are primarily quotations from cases quoted within the briefs, merely raise a legal defense: even if Appellees were factually correct, *i.e.*, Appellants did create minority controlled districts "wherever possible," existing legal precedent authorized such action. This defense is not inconsistent with the position advocated by Appellants before this Court.

[10] Appellees' accompanying assertion that Appellants have diluted minority voting strength by reducing the number of districts in which African Americans constitute 10% or more of the voting age population is also without merit. Even a cursory comparison of the African American voting age populations of the districts in the various plans conclusively rebuts Appellees' argument that Appellants "packed" as many African American voters into as few districts as possible. Although the number of districts with greater than 10% African-American voting age population was reduced from 27 in the 1981 plan to 21 in "Amendment D," the plan submitted by Appellees Ferguson and Quilter contained only 20 such districts. Table I, contained in the Appendix hereto, shows this comparison.

court's January 31, 1992 Order,[11] however, Appellees now make an equally frivolous argument: they contend that Appellants somehow waived their argument that they need not perform a totality of circumstances analysis prior to their redistricting by "voluntarily" presenting evidence relevant to such analysis to the trial court in this case.[12]

Appellants have maintained throughout this litigation that Appellees bore the burden of proving that the Ohio plan of apportionment violated § 2 of the Voting Rights Act under the totality of the circumstances analysis this Court adopted in *Thornburg*. Indeed, it was not until the district court's January 31, 1992 Order that it was even suggested that Appellants were required to perform such an analysis *as a prerequisite* to redistricting.

It is frivolous to contend, as Appellees do, that because Appellants presented "totality of circumstances evidence" to the trial court in defense of Appellees' § 2 claim, we have somehow waived our argument that the district court improperly shifted the burden of proof to Appellants. Appellees would apparently have this Court hold that only plaintiffs, and not state redistricting defendants, are permitted to present such evidence in a § 2 case, and that the plaintiffs' evidence on these issues can be rebutted only at the risk of "voluntarily" assuming the burden of proof.

D. Finally, Appellees argue that the Appellants impermissibly "packed" African American voters because

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[11] Appellants responded to this contention at pages 5-7 of their *Brief in Opposition to Motion to Dismiss Appeal and to Affirm Ruling of Trial Court* filed on May 15, 1992. No additional response is warranted.

[12] As noted in *Appellants' Brief*, Appellants' initial "totalities analysis" was informal in nature and developed for presentation as defense evidence to the district court. The more formal, detailed analysis undertaken to "justify" the minority controlled districts in the plan upon remand from the district court's January 31, 1992 Order can in no sense be considered "voluntary."

the new districts in which incumbent African American legislators intend to seek reelection contain slightly higher percentages of minority population than their present districts. *Appellees' Brief* at 10-13.[13] This argument is flawed in several respects.

First, the argument presumes that § 2 of the Voting Rights Act requires that redistricting be based upon the incumbencies of particular legislators. Appellants maintain that the Voting Rights Act was designed to protect a class of *voters*, not a class of incumbent legislators. See *Findings and Conclusions*, App. at 235a (Ohio Apportionment Board, Feb. 18, 1992). Dr. King testified that minority incumbent state legislators enjoyed a significant advantage over their election opponents. J.A. 259-62. Given that redistricting should not be based upon the incumbencies of particular legislators, Dr. King's analysis supported the relatively modest increase in minority population in these legislators' districts. J.A. 260.[14]

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[13] A similar argument was made by Amici Curiae Congressman Louis Stokes, *et al. Brief of Amici Curiae Congressman Louis Stokes, et al.*, at 5. We note that Congressman Stokes, as one of the parties with whom Appellants consulted regarding the configuration of minority controlled districts, endorsed the reapportionment of Cuyahoga County, where four of the five minority controlled districts are located, see D. 154, Ex. 16 at 2-12, 20-21. Congressman Stokes now apparently argues that those districts pack African American voters.

[14] Contrary to Appellees' argument, the increases were indeed modest. The African American population in Representatives Jones' district was increased from 41.70% [1981 HD45] to 49.90% (46.42% black VAP) ["Amendment D" HD49]; in Representative Sykes' district from 35.40% [1981 HD42] to 43.07% (39.86 black VAP) ["Amendment D" HD44]; in Representative Roberts' district from 36.10% [1981 HD37] to 41.69% (38.28% black VAP) ["Amendment D" HD39]; in Representative McLin's district from 42.10% [1981 HD36] to 43.50% (40.10% black VAP) ["Amendment D" HD38]; in Representative Mallory's district from 45.90% [1981 HD23] to 49.16% (43.13% black VAP) ["Amendment D" HD31]; in Representative Rankin's district from 53.20% [1981 HD25] to 55.98% (52.72% black VAP) ["Amendment D" HD30];

Second, Appellees' argument, in effect, interprets federal law to require the maximization of minority voting strength. Appellees evidently assert that minorities are *per se* "packed" into a legislative district if that district contains even one more minority voter than is required to reelect an incumbent representative of the minority community's choice. If this approach were adopted, state redistricting officials would be required to perform a detailed statistical analysis to determine the minimum number of minority voters necessary to elect a candidate favored by minority voters in each district with a potentially significant minority population. They would then be mandated to construct districts with those minimum numbers of minority voters, and place "excess" minority population in districts where they might arguably exert some influence on the electoral process. This approach is without any legal support, is fundamentally at odds with the principles of the Voting Rights Act, and is directly contrary to § 2's disavowal of proportional representation.

Third, this argument is inconsistent with Appellees' assertion that racial bloc voting does not exist in Ohio. If racial bloc voting does not exist in Ohio, then Appellees fail to prove their claim of minority vote dilution under

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and in Representative Miller's district from 38.50% [1981 HD29] to 54.30% (48.30% black VAP) ["Amendment D" HD21]. Moreover, the proportion of African American population in four incumbent African American legislators' districts was significantly *decreased* from the 1981 Democrat constructed plan of apportionment. The African American population in Representative Prentiss' district was decreased from 90.05% [1981 HD14] to 65.64% (61.41% black VAP) ["Amendment D" HD8]; in Representative James' district from 74.80% [1981 HD12] to 67.35% (63.42% black VAP) ["Amendment D" HD10]; in Representative Whalen's district from 94.67% [1981 HD16] to 67.25% (65.13% black VAP) ["Amendment D" HD12]; and in Representative Beatty's district from 46.80% [1981 HD31] to 44.68% (40.98% black VAP) ["Amendment D" HD22]. App. 260a-263a. Appellees do not cite these figures because they do not support their assertion that Appellants egregiously packed African American voters into as few districts as possible. See Table I in Appendix hereto.

this Court's analysis in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and African American voters cannot be considered "packed." In the absence of racial bloc voting, the configuration of district lines does not prohibit African Americans from electing a candidate of their choice.

In sum, there is simply no evidence that the 1991 plan of apportionment, *i.e.*, "*Amendment D*," in any way dilutes the voting strength of minorities anywhere in Ohio. Consequently, this Court should reverse the decision of the district court and remand the case with instructions to dismiss Appellees' claim under § 2 of the Voting Rights Act.[15]

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[15] Although Appellants believe that the position advocated by the United States, *i.e.*, that Appellees failed to prove their claim under § 2 of the Voting Rights Act because they do not satisfy the three preconditions of *Thornburg v. Gingles*, 478 U.S. 30 (1986), is a correct one, this Court need not decide this case on that basis. As demonstrated above, the facts of this case simply do not support Appellees' assertions and novel theories of a § 2 violation. In any event, Appellants believe that Appellees, as well as Amici Curiae Congressman Louis Stokes, *et al.*, misconstrue the United States' argument in this regard.

Appellees suggest, at pages 43-44 of their *Brief*, that the United States argues that racial bloc voting must *always* be proven as a precondition to establishing a § 2 claim. We do not understand the United States to make such a sweeping argument. Rather, the government asks the Court to apply the *Thornburg v. Gingles* preconditions only to claims that the drawing of electoral district lines has impermissibly diluted the voting strength of a particular racial group by fragmenting or packing that group's voters. See *Brief of the United States as Amicus Curiae* at 14. Thus, under the United States' view, challenges to voter registration practices, candidate qualification requirements, the location of polling places, and a whole host of other election procedures could presumably be brought under § 2 without any need to satisfy the *Thornburg v. Gingles* preconditions.

Accordingly, Appellees further err in suggesting that the United States' position is inconsistent with this Court's recognition in *Chisom v. Roemer*, 111 S.Ct. 2354 (1991), that even small groups of minority voters are protected by § 2 because such groups could influence the outcome of an election. 111 S.Ct. at 2365 n.24. Appli-

II. THE DISTRICT COURT ERRED IN HOLDING THAT THE APPORTIONMENT BOARD VIOLATED THE FIFTEENTH AMENDMENT.

As noted in the amici curiae briefs of both the United States and the NAACP Legal Defense and Educational Fund, *et al.*, as well as in *Appellants' Brief*, the finding of a Fifteenth Amendment violation simply cannot withstand scrutiny. Once Appellees have failed on their Voting Rights Act claim that Appellants curtailed minority participation in the political process, Appellees must necessarily fail on their Fifteenth Amendment claim that Appellants intentionally discriminated against that minority with respect to that process.

The district court's finding that Appellants intentionally discriminated against minorities in drafting the 1991 plan of apportionment, as amended—a finding that appears to have been almost an afterthought—belies all logic and common sense. Appellants consulted extensively with minority groups throughout the process of drafting the apportionment plan. The Ohio NAACP endorsed the districts in all of Ohio's urban counties, which have now also apparently been endorsed by the National NAACP. See *Brief of Amici Curiae NAACP Legal Defense and Education Fund, et al.*, at 12-22. In addition, the minority districts in Cuyahoga County—which contains four of the five minority-controlled districts under the 1991 plan of apportionment, as amended—have been endorsed by the Black Elected *Democrats* of Ohio ("BEDO"), the Black Elected *Democrats* of Cleveland, Ohio ("BEDCO"), Senator Jeff Johnson (an African American member of the General Assembly from Cuyahoga County), and Rep-

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cation of the *Thornburg v. Gingles* preconditions to one class of § 2 claims—those involving "dilution" challenges to the drawing of district lines—would not undermine the ability of small minority groups to bring other § 2 challenges to electoral procedures or practices that frustrate their equal "opportunity . . . to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).

resentative Louis Stokes (an African American member of the United States Congress from Cleveland). The evidence cited by Appellees and the district court simply does not support the extraordinary finding of unconstitutional discrimination against a minority group when so many prominent members of that minority group endorsed the plan of apportionment. See *City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980). See also *Fund for Accurate and Informed Representation, Inc. v. Weprin*, — F.Supp. —, 1992 WL 204274, slip op. at *5 (N.D.N.Y. Aug. 19, 1992) ("[Plaintiffs] claim minority vote dilution was caused by defendant's partisan gerrymandering efforts. * * * It is well settled that constitutional claims [under the Fourteenth and Fifteenth Amendments] require proof that the apportionment plan be 'conceived or operated as [a] purposeful device[] to further racial discrimination.' Without a racially discriminatory aim, the purposeful discrimination required under the Constitution cannot be shown.") (citations omitted).

III. THE DISTRICT COURT ERRED IN FINDING A VIOLATION OF THE FOURTEENTH AMENDMENT.

The Briefs of Appellees and Amici Curiae NAACP Legal Defense and Educational Fund, *et al.*, fail to support the district court's finding of a Fourteenth Amendment violation. A proper analysis of the Fourteenth Amendment claim requires reversal of that finding.

This Court has long held "that a desire to preserve the integrity of political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate v. Mundt*, 403 U.S. 182, 185 (1971). See also *Reynolds v. Sims*, 377 U.S. 533, 578 (1964). Accordingly, this Court has concluded that a total population deviation of under 10% is insufficient to make out a *prima facie* case of a Fourteenth Amendment violation. Population deviations of greater than 10% must, however, be justified as reasonably advancing a rational state policy. *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983).

In the present case, the district court merely concluded that because the population deviations exceeded 10%—13.81% total deviation for the Ohio House of Representatives and 10.54% for the Ohio Senate—those districts which are not within plus or minus five percent of the ideal population are invalid. The court, which did not make the finding of a Fourteenth Amendment violation until it issued its March 18, 1992, opinion denying Appellants' request for a stay, failed to analyze this claim within the framework adopted by this Court in *Brown*, *supra* and *Mahan v. Howell*, 410 U.S. 315 (1973).

Initially, it must be noted that Appellees' Fourteenth Amendment claim, as well as the district court's finding of a violation, is based solely upon the population of three house districts and one senate district.[16] Appellees asserted no claim that these districts were slightly "underpopulated" because of any racial or political discrimination. Appellees' belated suggestion to the contrary, see *Appellees' Brief* at 33, is simply an effort to obfuscate this Court's consideration of this issue.

Moreover, it is undisputed that the deviations in these four districts were the result of complying with the antigerrymandering provisions of Article XI of the Ohio Constitution.[17] The three house districts were all created pursuant to Article XI, §§ 9 and 10(B) of the Ohio Constitution. These provisions express the Ohio Constitutional

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[16] It must also be noted that the senate district involved is the senate district expressly validated by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992).

[17] Appellees attempt to discredit this state policy by asserting that the 1991 plan of apportionment is replete with violations of the Ohio Constitution. Once again, however, it must be emphasized that the district court abstained on all state law issues. The Ohio Supreme Court concluded that the plan was consistent with the Ohio Constitution, but instructed the Apportionment Board to make technical corrections to the plan to bring it into full compliance. The Board obeyed those instructions when it adopted "Amendment D" on February 18, 1992.

policy of respecting county boundaries by creating whole-county house districts where reasonably possible. In furtherance of that policy, these sections authorize the Apportionment Board to create a house district from a single whole county when that county's population is within plus or minus 10% of the ideal population.

The constitutional policy of respecting county boundaries by creating whole county house districts where reasonably possible is a rational state policy that was consistently applied by the Apportionment Board. The Apportionment Board created all three house districts possible under §§ 9 and 10(B): House District 5 (Ashtabula County), House District 6 (Fairfield County), and House District 7 (Wayne County). To add population to any of those districts would require the division of another county by severing a relatively small portion of an adjacent county to combine with the whole county. Voters in the small portion of the divided county would, in all likelihood, have very little influence in a district comprised almost entirely of another single county.

Similarly, the senate district invalidated by the district court, Senate District 32, is slightly "underpopulated" as a result of the Apportionment Board's respect of county boundaries. As noted by the Ohio Supreme Court in *Voinovich v. Ferguson*, 63 Ohio St. 3d 198 (1992), to add population to Senate District 32 would have required the Apportionment Board to cross county boundaries and violate one or more other provisions of Article XI of the Ohio Constitution. The Ohio Supreme Court held that it would "not order [the Apportionment Board] to correct one constitutional violation by committing another." 63 Ohio St. 3d at 200. Accordingly, the creation of Senate District 32 is also a result of the pursuit of the state policy of respecting county boundaries.

The NAACP Legal Defense and Educational Fund, *et al.*, acknowledge the Apportionment Board's pursuit of this rational state policy, but nevertheless assert that

the total deviation violates the Fourteenth Amendment because the *largest* district was not created pursuant to this policy, *i.e.*, the largest house district (HD 20) is wholly within Cuyahoga County, and presumably could be reduced in population to effect a reduction in total deviation. This assertion, however, incorrectly attributes the Fourteenth Amendment violation to the size of the largest districts, House District 20 and Senate District 1. Both are well within the 105% limit of Article XI, §§ 3 and 4, and account for only a small portion of the total deviations among house and senate districts. The bulk of total deviation is a result of adherence to the express Ohio Constitutional policy of respecting county boundaries where reasonably possible by creating whole county house districts.[18]

The four districts at issue in this case (HD5, HD6, HD7, and SD32) are solely the result of adherence to the rational, and express, state constitutional policy of respecting county boundaries where reasonably possible. Accordingly, the district court's finding of a Fourteenth Amendment violation must be reversed.

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[18] The population of House District 20 is only 4.91% above the ideal population of 109,567, *i.e.*, one house ratio. The smallest house district, House District 5 (Ashtabula County), is 8.90% below the ideal population.

Similarly, the population of Senate District 1, the largest senate district, is only 4.53% above the ideal population of 328,700, *i.e.*, one senate ratio. The smallest senate district, Senate District 32, is 6.01% below the ideal population. Senate District 1 is comprised of three house districts consisting of nine whole counties and part of one county (HD82, HD83, and HD86).

CONCLUSION

For the reasons stated herein and in our opening *Brief*, Appellants respectfully request that this Court reverse the March 10, 1992, March 19, 1992, and the March 31, 1992 judgments of the district court, and remand the case to that court with instructions to enter judgment in favor of the Defendants-Appellants.

Respectfully submitted,

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Dated: October 14, 1992

APPENDIX

APPENDIX

Table I *

1981 Plan		"Amendment D"		Ferguson/Quilter Plan	
District	% Black	District	% Black VAP	District	% Black VAP
16	94.67	12	65.13	12	67.08
14	90.05	10	63.42	16	66.67
12	74.80	8	61.41	14	63.71
25	53.20	9	58.36	13	60.18
31	46.80	30	52.72	28	57.91
23	45.90	21	48.30	21	50.60
36	42.10	49	46.42	33	47.10
45	41.70	31	43.13	19	46.40
29	38.50	22	40.98	36	45.26
37	36.10	11	40.61	45	44.98
42	35.40	38	40.10	42	43.09
15	34.80	44	39.86	37	36.20
24	32.30	39	38.28	55	31.19
53	27.80	64	31.19	15	26.46
32	26.60	32	20.76	34	19.55
17	26.14	54	12.93	32	16.71
50	14.90	61	12.34	50	12.49
18	14.70	33	11.84	61	10.92
19	14.40	73	10.71	20	10.88
47	13.20	66	10.28	1	10.07
59	12.81	1	10.01		
22	12.60				
30	12.40				
27	12.20				
62	11.64				
1	11.15				
52	10.50				

* Compiled from App. 96a-98a, 177a-178a, 185a, 260a-263a; D. 153, Ex. 120.

TABLE OF DOCKET AND EXHIBIT NUMBERS

D. 73 Deposition of Floyd Johnson (Nov. 27, 1991)

D. 102 Deposition of James R. Tilling (Nov. 20, 1991)

D. 125 Deposition of Floyd Johnson (Dec. 10, 1991)

D. 147 Notice of Filing Record (filed Feb. 19, 1992)

Ex. B Apportionment Board Hearing Transcript (Feb. 11, 1992)

Ex. C Apportionment Board Hearing Transcript (Feb. 18, 1992)

D. 154 Joint Trial Exhibits (filed Feb. 19, 1992)

Ex. 16 Apportionment Board Hearing Transcript (Oct. 1, 1991)

Ex. 17 Apportionment Board Hearing Transcript (Oct. 3, 1991)

D. 156 Order (granting leave to file brief) (Feb. 26, 1992)

D. 159 Order (granting leave to file brief) (March 5, 1992)

D. 169 Order (to produce files to special master) (March 16, 1992)

D. 187 Order (instructions to special master) (April 28, 1992)

D. 189 Order (granting motion for status conference) (May 1, 1992)

D. 191 Order (docketing exhibits) (May 5, 1992)